Convergys Corporation *and* Hope Grant. Cases 14–CA–075249 and 14–CA–083936

November 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On October 25, 2012, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the judge's recommended Order as modified and set forth in full below.

1. We affirm the judge's finding that the Respondent violated Section 8(a)(1) by maintaining a requirement that employees waive their right to litigate employment-related disputes on a class or collective basis. As more fully set forth in the judge's decision, the Respondent required all job applicants, as a condition of employment, to agree that they would pursue any claim or lawsuit relating to their employment on an individual basis, "and will not lead, join, or serve as a member of a class or group of persons bringing such a claim or lawsuit." As this is a workplace rule, we treat it as the Board treats other unilaterally implemented workplace rules by analyzing it under the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under this test, a work rule will be found unlawful if it explicitly restricts activities protected by Section 7. Id. at 646.[1] The Respondent's rule explicitly does this. It states plainly and unambiguously that employees may not pursue any lawsuit against the Respondent as part of a class or group of persons. The Board has long and consistently held, with uniform judicial approval, that the Act protects the right of employees to join together to improve their terms and conditions of employment through litigation.[2] Accordingly, by requiring employees to waive their right to engage in class or group litigation as a condition of employment, the Respondent has interfered with their Section 7 right and violated Section 8(a)(1) of the Act.[3]

[1] If the rule does not explicitly restrict Sec. 7 activity, the Board may additionally find a violation if: (1) employees would reasonably construe the rule to prohibit Sec. 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Sec. 7 rights. Id. at 647.

[2] See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978) (holding that Sec. 7 protects employees' efforts to improve their working conditions "through resort to administrative and judicial forums"); *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162, 1170 (2005) (finding employees' joint wage-and-hour lawsuit protected concerted activity); *Le Madri Restaurant*, 331 NLRB 269, 275–276 (2000) (same); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) (same), enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978); *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853–854 (1952) (finding that Sec. 7 protects employee's circulation of petition among coworkers, designating him as their agent to seek back wages under the Fair Labor Standards Act ("FLSA")), enfd. 206 F.2d 325 (9th Cir. 1953); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–949 (1942) (finding employees' joint FLSA suit protected concerted activity). See also *Beyoglu*, 362 NLRB No. 152, slip op. at 2 (2015) (individual employee's filing of an employment-related class or collective action is "an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7.").

[3] In *D. R. Horton, Inc*., 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied in relevant part __F.3d __ , No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015), the Board applied the *Lutheran Heritage* test to find unlawful similarly imposed rules that waived employees' Sec. 7 right to pursue employment claims on a class or collective basis. The unlawful waivers in those cases were set forth in arbitration agreements. The instant case, however, does not involve an arbitration agreement or, accordingly, implicate any issues involving the Federal Arbitration Act.

We reject our dissenting colleague's argument that the class action waiver agreement here entails a voluntary exercise of a job applicant's right to refrain from pursuing collective actions and to pursue individual adjustment of grievances with the Respondent. We note that the Respondent does not even make this argument. The judge found, and the Respondent acknowledges in its brief, that signing the job applications containing the collective litigation waiver was a condition of employment for all applicants. They could either "agree" to the waiver or not be employed. Under these circumstances, the waiver was a mandatory condition of employment and thus unlawful. But even if the waiver was not mandatory, it would still be unenforceable. See *On Assignment Staffing Services,* 362 NLRB No. 189, slip op. at 8 (2015) (explaining that "Federal labor law and policy . . . prohibit agreements in which employees prospectively waive their right to engage in concerted activity for mutual aid or protection"). Contrary to our dissenting colleague, our finding that the class action waiver is unlawful does not "operate[ ] in reverse" of Sec. 7 protections by denying employees the choice of refraining from engaging in collective pursuit of their employment claims. *Bristol Farms*, 363 NLRB No. 45, slip op. at 1–2 (2015).

The dissent also maintains that the Act does not "dictate" that employees are entitled to class or other particular treatment of non-NLRA claims. This is surely correct, as the Board has previously explained. See, e.g., *Murphy Oil*, supra, 361 NLRB No. 72, slip op. at 2. But what our colleague ignores is that the Act does "create[] a right to *pursue* joint, class, or collective claims if and as available without the interference of an employer-imposed restraint." Id. at 16–17. The Respondent's waiver is just such an unlawful restraint.

2. We also affirm the judge's finding that the Respondent violated Section 8(a)(1) by enforcing its mandatory waiver through its motion to strike the class and collective allegations in a lawsuit filed by employee (and Charging Party) Hope Grant. Grant filed a class and collective action in Federal district court, alleging that the Respondent was violating the FLSA and state wage-hour law. The Respondent filed a motion to strike the class and collective claims, citing the waiver described above. The court denied the Respondent's motion on the basis that the waiver violated the Act. *Grant v. Convergys Corp.,* No. 4:12–CV–496, 2013 WL 781898 (E.D. Mo. 2013).[4]

In finding that the Respondent violated Section 8(a)(1) by enforcing the waiver through its motion to strike, the judge purported to apply *D. R. Horton*. That case, however, presented no enforcement issue. It is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights. See *Bigg's Foods*, 347 NLRB 425 (2006) (finding unlawful the respondent's enforcement of no solicitation/no distribution rule). See also *Murphy Oil,* supra, slip op. at 19 and cases cited therein. That is precisely what the Respondent did here through its motion to strike.[5] As the Supreme Court held long ago, the Board has the authority to prevent an employer from taking any benefit from "contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act." *National Licorice Co. v. NLRB,* 309 U.S. 350, 365 (1940) (enforcing Board order requiring employer to cease enforcing individual contracts under which employees waived rights under the Act); cf. *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 83 (1982) ("[A] federal court has a duty to determine whether a contract violates federal law before enforcing it."). Our determination that the Respondent violated the Act by its enforcement, in court, of the unlawful waiver is consistent with these fundamental principles.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Convergys Corporation, Hazelwood, Missouri, its officers, agents, successors, and assigns, shall

Cease and desist from

(a) Maintaining and/or enforcing a provision in its job applications that requires employees to waive their right to pursue employment-related claims or lawsuits as class, collective, or joint actions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind, nationwide, the provision in its job applications that requires employees and applicants to agree to pursue employment-related claims or lawsuits as individuals and not to lead, join, or serve as a member of a

[4] The court subsequently certified the question of whether the waiver was enforceable for interlocutory appeal. *Grant v. Convergys Corp.,* No. 4:12–CV–496, 2013 WL 1342985 (E.D. Mo. 2013). The Eighth Circuit dismissed the appeal in an unreported 2014 order (No. 13–2094).

[5] We reject our dissenting colleague's view that the Respondent's motion to strike was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Court identified two situations in which a lawsuit enjoys no such First Amendment protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to strike that have the illegal objective of limiting an employee's exercise of Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21.

[6] On September 8, 2014, Charging Party Grant filed a request to withdraw her charge in this case, asserting that the wage-hour claims alleged in her class action lawsuit against the Respondent were settled pursuant to a non-Board Settlement Agreement and Release of Claims. On June 8, 2015, the Board issued an Order denying the request because the settlement did not provide a remedy for the unfair labor practices found by the judge. We take administrative notice that the Federal district court entered an order dismissing Grant's lawsuit with prejudice on February 3, 2014, in accordance with its "December 9, 2013 order approving the class action settlement agreement."

Because the lawsuit has been dismissed, we find it unnecessary to order the Respondent, as in *Murphy Oil* (at 21–22), to remedy the Sec. 8(a)(1) enforcement violation by notifying the court that it no longer opposes Grant's lawsuit. However, it is not clear from the settlement agreement whether Grant was reimbursed for attorneys' fees and expenses, if any, that she may have incurred in opposing the Respondent's unlawful enforcement of its waiver through its motion to strike her lawsuit. Accordingly, consistent with our decision in *Murphy Oil*, supra, at 21, we shall amend the judge's remedy and order the Respondent, to the extent that it has not done so pursuant to the settlement agreement, to reimburse Grant for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Teamsters Local 776 (Rite Aid*), 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

class or group of persons bringing such a claim or lawsuit.

(b) Notify all applicants and current and former employees, nationwide, that the above-described waiver agreements have been rescinded and are no longer in force.

(c) In the manner set forth in this decision, reimburse Grant for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing the Respondent's motion to strike her class and collective claims.

(d) Within 14 days after service by the Region, post at its Hazelwood, Missouri facility copies of the attached notice marked "Appendix A" and at all its other facilities nationwide copies of the attached notice marked "Appendix B."[7] Copies of the notices, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at its Hazelwood, Missouri call center at any time since August 23, 2011.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. November 30, 2015

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

This case involves an employment agreement that incorporates a waiver of class and collective procedures in pursuit of legal claims unrelated to the National Labor Relations Act ("NLRA" or "Act"). In this respect, the employment agreement here resembles the class-action waiver agreement invalidated by the Board majority in *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied in relevant part __F.3d__, No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015). However, the agreement in *Murphy Oil* also provided for the arbitration of non-NLRA claims, which therefore implicated the Federal Arbitration Act ("FAA"). The class-action waiver here does *not* provide for arbitration of non-NLRA claims, and this renders the FAA inapplicable.

Nonetheless, for the same reasons described at length in my partial dissenting opinion in *Murphy Oil*,[1] I dissent from my colleagues' finding that the Respondent's employment agreement—specifically, the waiver of class-type procedures regarding non-NLRA claims—constitutes interference with or restraint or coercion of employees' right to engage in protected concerted activity in violation of NLRA Section 8(a)(1). In this regard, I emphasize the following points.

First, I agree that the NLRA protects employees from retaliation when they engage in concerted activity for the purpose of mutual aid or protection. Two or more employees enjoy Section 7 protection when they engage in activity that satisfies the requirements set forth in that section of the Act: first, "concerted" activity (i.e., activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself" or, where the activity involves only a speaker and a listener, speech "engaged in with the object of ini-

[1] *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 22–35 (Member Miscimarra, dissenting in part). As noted above in the text, Respondent's class-action waiver agreement does not provide for mandatory arbitration of non-NLRA claims, which renders the FAA inapplicable. Therefore, I do not rely here on Part D of my *Murphy Oil* partial dissent (id., slip op. at 34) pertaining to the FAA.

tiating or inducing or preparing for group action"), and second, a "purpose" of "mutual aid or protection."[2] As stated in my *Murphy Oil* partial dissent, this can include protected concerted activities in connection with non-NLRA claims (or potential claims) asserted against an employer or union.[3]

Second, Congress did not vest the Board with the authority to dictate any particular *procedures* under which non-NLRA claims are to be litigated, nor does the Act entitle employees to class-type treatment of such claims. To the contrary, as explained in my *Murphy Oil* partial dissent, I believe it is clear that Congress contemplated that procedural matters involving non-NLRA claims would be governed by the applicable statutes or laws governing such claims, supplemented by whatever additional procedural rules were authorized or adopted by Congress, State legislatures, or the courts and/or agencies vested with jurisdiction over such claims.

Third, even if employees had an NLRA-protected right to insist on the class-type treatment of non-NLRA claims, the NLRA would also protect the right of employees *not* to bring such claims on a class or group basis. In this regard, Section 7 of the Act gives every employee the right "to refrain" from NLRA-protected collective activity, which would give every employee a right to litigate non-NLRA claims individually rather than through class or collective actions. Moreover, Section 9(a) of the Act protects the right of every employee "at any time" to present and adjust grievances on an "individual" basis, and this right to resolve non-NLRA disputes at any time as an individual necessarily permits employees to enter into agreements waiving class or collective procedures in connection with their non-NLRA claims.[4] An employee's exercise of this right, which is affirmatively protected under the Act, cannot reasonably be deemed a violation of the same statute.

In the instant case, consistent with these principles, the Respondent's employees agreed that they would pursue any non-NLRA claims relating to their employment on an individual basis.[5] Charging Party Hope Grant signed such an agreement in September 2011. In 2012, however, Grant filed a class and collective action against the Respondent in the United States District Court for the Eastern District of Missouri, alleging violations of the Fair Labor Standards Act and state wage-and-hour law. There is no allegation that the Respondent took any job-related action against Grant based on her filing this lawsuit. In Grant's non-NLRA court case, the Respondent moved to strike Grant's class- and collective-action claims based on her agreement that such claims would be litigated individually.[6]

For the above reasons and those stated in my *Murphy Oil* partial dissent, I believe the Board lacks authority to find that Respondent's actions violated Section 8(a)(1) of the NLRA, and I also believe Respondent's motion to strike Grant's class- and collective-action claims is protected by the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516

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[2] See *Meyers Industries*, 268 NLRB 493, 497 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882, 887 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

[3] For examples of protected concerted activities pertaining to non-NLRA claims, see my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 24–25.

[4] Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment." (Emphasis added.)

[5] The class-action waiver agreements were voluntarily signed, even though Respondent was willing to hire employees or continue their employment only if they entered into the agreements. For my colleagues, however, the voluntariness of such a waiver is also immaterial. They indicate that "even if the waiver was not mandatory, it would still be unenforceable." See *On Assignment Staffing Services*, 362 NLRB No. 189 (2015) (finding class-action waiver agreement unlawful even where employees are free to opt out of the agreement); *Bristol Farms*, 363 NLRB No. 45 (2015) (finding class-action waiver agreement unlawful even where employees must affirmatively opt *in* before they will be covered by a class-action waiver agreement, and where they are free to decline to do so). By definition, every agreement sets forth terms upon which each party may insist as a condition to entering into the relationship governed by the agreement. Thus, conditioning employment on the execution of a class-action waiver does not make it involuntary. However, the Board's position is even less defensible when the Board finds that NLRA "protection" operates in reverse—not to *protect* employees' rights to engage or refrain from engaging in certain kinds of collective action, but to *divest* employees of those rights by denying them the right *to choose* whether to be covered by an agreement to litigate non-NLRA claims on an individual basis. See *Bristol Farms*, above, slip op. at 3–4 (Member Miscimarra dissenting).

[6] The court denied the Respondent's motion on the basis that the agreement violated the Act. *Grant v. Convergys Corp.,* No. 4:12–CV–496, 2013 WL 781898 (E.D. Mo. 2013), reconsideration denied, motion to certify interlocutory appeal granted 2013 WL 1342985 (E.D. Mo. 2013), appeal dismissed No. 13–2094 (8th Cir. 2014). The district court subsequently dismissed Grant's lawsuit with prejudice on February 3, 2014, in accordance with its "December 9, 2013 order approving the class action settlement agreement."

(2002); *Murphy Oil,* above, slip op. at 33–35 (Member Miscimarra, dissenting in part). Even though Respondent's motion was denied, this determination was properly made by the court vested with jurisdiction over the Charging Party's lawsuit, subject to potential appeal under the non-NLRA statute(s) applicable to that lawsuit. Additionally, one cannot reasonably suggest that the Respondent lacked a reasonable basis for its motion, given the multitude of court decisions that have enforced class waivers similar to Respondent's agreement.[7]

Accordingly, I respectfully dissent.

Dated, Washington, D.C. November 30, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a provision in our job applications that requires you to waive your right to pursue employment-related claims or lawsuits as class, collective or joint actions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above, which are guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL rescind the provision in our job applications that requires employees to agree to pursue employment-related claims or lawsuits as individuals and not to lead, join, or serve as members of a class or group of persons bringing such a claim or lawsuit.

WE WILL notify all our employees that the above-described waiver agreements have been rescinded and are no longer in force.

WE WILL reimburse Hope Grant for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing our motion to strike her class and collective allegations.

CONVERGYS CORPORATION

The Board's decision can be found at www.nlrb.gov/case/14-CA-075249 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[7] See, e.g., *Owen v. Bristol Care, Inc.,* 702 F.3d 1050, 1055 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013). The Fifth Circuit denied enforcement (in relevant part) of the Board's order in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), the first case in which the Board invalidated an agreement that waived class-type treatment of non-NLRA claims. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). The Fifth Circuit recently reaffirmed its rejection of the Board's position in *Murphy Oil*, above. The overwhelming majority of other courts considering the Board's position have likewise rejected it. See *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases). To be sure, the agreements at issue in those cases typically provided for arbitration, and the FAA and Supreme Court decisions enforcing the FAA provide additional grounds for rejecting the Board's holding in *D. R. Horton* and *Murphy Oil*. But aside from the decision of the district court in *Grant v. Convergys Corp.*, above, I am unaware of any court decision invalidating a class-action waiver agreement, such as Respondent's, that does not include an arbitration agreement. Indeed, another Federal district court *granted* Respondent's motion to strike class and collective claims based on an agreement identical in all relevant respects to the one at issue here. *Palmer v. Convergys Corp.*, No. 710–cv–145, 2012 WL 425256 (M.D. Ga. 2012).

Even if the Respondent has not defended its position by invoking the First Amendment, the Respondent did file an opposition to the General Counsel's request for attorneys' fees—a remedy my colleagues grant. For the reasons expressed in the text, I believe such a remedy "is unwarranted in the circumstances presented here." *Murphy Oil,* above, slip op. at 35 (Member Miscimarra, dissenting in part).

APPENDIX B
NOTICE TO EMPLOYEES
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An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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WE WILL NOT maintain a provision in our job applications that requires you to waive your right to pursue employment-related claims or lawsuits as class, collective or joint actions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above, which are guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL rescind the provision in our job applications that requires employees to agree to pursue employment-related claims or lawsuits as individuals and not to lead, join, or serve as members of a class or group of persons bringing such a claim or lawsuit.

WE WILL notify all our employees that the above-described waiver agreements have been rescinded and are no longer in force.

CONVERGYS CORPORATION

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Rotimi Solanke, Esq. for the General Counsel.
Raymond D. Neusch, Esq. (Frost Brown Todd, LLC), of Cincinnati, Ohio, for the Respondent.
Mark A. Potashnick, Esq. (Weinhaus & Potashnick), of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was submitted to me upon a stipulated record pursuant to the parties' joint motion. Hope Grant, the Charging Party, filed the charges giving rise to this case on February 23, and June 26, 2012. The General Counsel issued the complaint in this case on July 31, 2012.

On the entire record and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Ohio corporation, with offices in Cincinnati, Ohio and places of business in many other states, including a call center in Hazelwood, Missouri.[1] Respondent performed services valued in excess of $50,000 in states other than Ohio in the year prior to the issuance of the complaint. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On about September 16, 2011, Hope Grant completed and submitted an application for employment with Respondent at its Hazelwood, Missouri call center. The form she submitted contained a waiver of the right to a jury trial, a waiver of any statute of limitations longer than 6 months and the following clause:

> 9. I further agree that I will pursue my claim or lawsuit relating to my employment with Convergys (or any of its subsidiaries or related entities) as an individual, and will not lead, join, or serve as a member of a class or group of persons bringing such a claim or lawsuit.

Respondent has required all applicants for a job at Convergys to sign this waiver as a condition of their employment since at least August 2011. Respondent hired Grant as a customer service representative in September 2011.

On March 16, 2012, Grant, individually and on behalf of the employees at Respondent's Hazelwood call center, filed a civil suit against Respondent in the United States District Court, Eastern District of Missouri. The complaint alleged that Respondent was violating the Fair Labor Standards Act (FLSA), 29 U.S.C. Section 201 et seq. The class action complaint alleges that Grant and other similarly situated customer service representatives perform preparatory activities and other related

[1] This case was consolidated with two charges filed by employees of the Valdosta, Georgia call center, which were withdrawn pursuant to a settlement agreement and then severed from the instant matter.

work activities that are integral and indispensable for them to perform their customer service duties. These include booting up computers, logging into and out of various computer programs and applications, and reading company communications. The complaint further alleges that Respondent does not pay employees for this time, in violation of the FLSA.

On June 22, 2012, Respondent filed a motion to strike the class and collective allegations in the FLSA suit. It argues that Grant and other employees had waived their right to bring any collective claims or suits pertaining to their employment. Grant's attorneys filed a memorandum in opposition to this motion to strike.

ANALYSIS

The General Counsel alleges that Respondent is violating Section 8(a)(1) of the Act by requiring job applicants to waive their rights to file collective lawsuits, by enforcing these waivers by filing the motion to strike the class and collective allegations of Grant's suit and defending against the class and collective allegations of Grant's suit on the basis of the waiver she signed.

Administrative Law Judges of the National Labor Relations Board are bound to follow Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals, *Waco, Inc.,* 273 NLRB 746, 749 fn.14 (1984).

The parties appear to recognize that I am bound by the Board's decision in *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), which is pending before the United States Court of Appeals for the Fifth Circuit. Respondent submits that the Board wrongly decided that case. However, unless it is materially distinguishable from the instant case, I am bound to conclude that Respondent violated the Act as alleged.[2]

In *D. R. Horton,* the Board held that, "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial," (slip opinion page 12 and 13). Thus, despite the fact that the *D. R. Horton* decision concerned a mandatory arbitration agreement, rather than a lawsuit which waived the employees' rights to maintain a class or collective action, it is clearly dispositive of this case. Indeed, the Board's order specifically requires *D. R. Horton* to cease and desist from "maintaining a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial."

In footnote 28 at page 13 of the decision, the Board stated that it was not reaching the more difficult question of whether an employer can require employees, as a condition of employment to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration. Since Respondent's employees did not have recourse to arbitration of their grievances, this does not present an issue in this case.

Respondent argues that this case is distinguishable because Hope Grant was a job applicant, not an employee within the meaning of the Act, when she signed the waiver. However, that is simply incorrect. Applicants for employment are employees within the meaning of section 2(3) of the NLRA, *Phelps Dodge Corporation v NLRB,* 313 US 177 (1944); *NLRB v. Town & Country Electric, Inc.,* 516 US 85, 88 (1995). Moreover, Ms. Grant was working for Respondent when she exercised the right found by the Board in *D.R. Horton* to file a class action lawsuit.

Finally, Respondent argues that even assuming that employees may have a Section 7 right to file or participate in a class action lawsuit, an employer does not violate the Act in seeking dismissal of the class action suit on the basis of a waiver such as the one it requires its job applicants to execute. The Board's discussion at page 6 of the *D.R. Horton* decision convinces me otherwise. The Board explicitly rejected the rationale of a General Counsel memo which indicated that while employees are free to bring employment-related class action lawsuits, the employer may seek to have the suit dismissed on the ground that the employees executed a valid waiver.

Respondent's brief at page 10 cites footnote 24 at page 10 of the Board's *D.R. Horton* decision in support of its argument that an employer does not commit an unfair labor practice by merely opposing a plaintiff's motion for class certification. I read footnote 24 as standing for the proposition that an employer remains free to assert arguments against certification other than those based on the kind of waiver Respondent required of job applicants in this case.[3]

CONCLUSIONS OF LAW

By maintaining and enforcing a mandatory provision in its employment applications that waives the right to maintain class or collective actions in all forums, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

REMEDY

Because the Respondent utilized the waiver herein on a corporate-wide basis, I shall recommend that the Respondent be ordered to post a notice at all locations where the waiver is in effect. See, e.g., *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Convergys, Cincinnati, Ohio, and Hazelwood, Missouri, its officers, agents, successors, and assigns, shall:

[2] I also believe it is not within my authority to opine as to whether the *D.R. Horton* is procedurally infirm, as Respondent contends.

[3] *D.R. Horton* does not prevent an individual employee from a noncoercive waiver of his or her right to participate in a class action lawsuit. It does hold that a waiver obtained by the employer as a condition of employment to be a violation of the NLRA.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Maintaining a mandatory requirement in its employment applications that waives employees' right to maintain class or collective actions in all forums.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise its employment applications to make it clear to employees that the application does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions.

(b) Notify the employees of the rescinded or revised application to include providing them a copy of the revised application or specific notification that provisions waiving their right to maintain employment-related class or collective actions has been rescinded.

(c) Within 14 days after service by the Region, post at its facility at Hazelwood, Missouri, and any other facility where the waiver provisions have been in effect, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 14 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 23, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 25, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT require you as a condition of your employment to waive the right to maintain class or collective actions in all forums.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind or revise our employment application to make it clear to employees that the application and their acceptance of employment do not constitute a waiver of the right in all forums to maintain class or collective actions.

WE WILL notify all employees who were subject to these waivers that we are no longer maintaining and enforcing this waiver. WE WILL provide these employees with either a revised employment application or specific notification that the waiver has been rescinded.

CONVERGYS CORP.